

1 **THE LAW OFFICES OF**  
2 **JOSEPH R. MANNING, JR., APC**  
3 Joseph R. Manning, Jr., Esq. (SBN: 223381)  
4 4667 MacArthur Blvd., SUITE 150  
5 Newport Beach, California 92660  
6 Telephone: (949) 200-8755  
7 Facsimile: (866) 843-8308  
8 Email: info@ManningLawOffice.com

9 Attorneys for Plaintiffs Samuel D. Ellsworth and Robin Ellsworth

10  
11 **UNITED STATES DISTRICT COURT**  
12 **CENTRAL DISTRICT OF CALIFORNIA – SOUTHERN DIVISION**  
13

14 SAMUEL D. ELLSWORTH and ROBIN  
15 ELLSWORTH,

16 Plaintiffs,

17 v.

18 AMERICAN HOME MORTGAGE  
19 SERVICING, INC., a business entity  
20 form unknown and POWER DEFAULT  
21 SERVICES, INC., a business entity form  
22 unknown and DOES 1-100, inclusive

23 Defendants.

24 CASE NO. SACV 12-1499 AG (MLGx)

25 The Hon. Andrew J. Guilford

26 STATEMENT OF GENUINE ISSUES  
27 MATERIAL FACTS AND  
28 CONCLUSIONS OF LAW IN  
OPPOSITION TO DEFENDANTS'  
MOTION FOR SUMMARY  
JUDGMENT OR, IN THE  
ALTERNATIVE, PARTIAL  
SUMMARY JUDGMENT

Date: June 3, 2013

Time: 10:00 a.m.

Dept.: 10D

Local Rule 56-2

1 Plaintiffs Samuel D. Ellsworth and Robin Ellsworth ("Plaintiffs") submit this  
 2 Separate Statement of Genuine Issues in response to Defendants' Statement of  
 3 Proposed Uncontroverted Facts and Conclusions of Law with references to  
 4 supporting evidence, in opposition to the Motion for Summary Judgment, pursuant to  
 5 Local Rule 56-2.

<b><u>MOVING PARTY'S' PROPOSED STATEMENT OF UNCONTROVERTED FACTS</u></b>	<b><u>PLAINTIFFS' RESPONSE</u></b>
9 1. In 2007, Samuel and Robin Ellsworth 10 ("Plaintiffs") obtained a loan in the 11 amount of \$1,500,000.00, secured by a 12 promissory note ("Note") and a deed of 13 trust ("DOT") encumbering their real 14 property located at 1702 La Loma Drive, 15 Lemon Heights, California (the 16 "Property").	<p><b><u>Undisputed.</u></b> but immaterial.</p> <p><b><u>Objection:</u></b> lacks foundation, hearsay and vague. This UF is quoted from Cindi Ellis's declaration, but that source contains no information on how she developed this conclusion.</p>
17 2. Plaintiffs became delinquent and the 18 first Notice of Default ("NOD") was 19 recorded against the title to their Property 20 on October 16, 2009.	<p><b><u>Disputed.</u></b> This assertion is not supported by any admissible evidence.</p> <p>The NOD was recorded on April 16, 2012. See Def. RJN Exhibit 2.</p>
21 22 3. Homeward modified Plaintiffs' loan 23 in 2009. 24 25 26 27 28	<p><b><u>Undisputed.</u></b> By virtue of this modification the requirements of §2923.5 were reset because the Plaintiffs were then current on the loan.</p> <p><b><u>Objection:</u></b> lacks foundation, hearsay and vague. This UF is quoted from Cindi Ellis's declaration, but that source</p>

	contains no information on how she developed this conclusion.
4. Plaintiffs defaulted on the modified loan and made their last payment in early 2012.	<p><b><u>Disputed.</u></b> This assertion is not supported by any admissible evidence.</p> <p><b><u>Objection:</u></b> lacks foundation, hearsay and vague. This UF is quoted from Cindi Ellis's declaration, but that source contains no information on how she developed this conclusion.</p>
5. Homeward attempted to contact Plaintiffs several times by telephone regarding their default in 2010.	<p><b><u>Disputed.</u></b> This assertion is not supported by any admissible evidence.</p> <p>Defendants did not attempt to contact Plaintiffs by telephone, did not send Plaintiffs first-class letter, did not send Plaintiffs a certified letter or provide a means for them to contact Defendants' live representative. (Exhibits "A" and "B", Declarations of Samuel D. And Robin Ellsworth, ¶¶ 9-14. )</p> <p><b><u>Objection:</u></b> lacks foundation, hearsay and vague. This UF is quoted from Cindi Ellis's declaration, but that source contains no information on how she developed this conclusion.</p>

1  
2  
3  
4 6. Plaintiff Robin Ellsworth (or her  
5 agent) discussed the possibility of a short  
6 sale with a Homeward representative.

**Disputed.** but immaterial, because even if such discussion took place, the NOD was recorded on April 16, 2012 and the apparent contact did not take place until May 2012. Even if this conversation took place, it was after the NOD was recorded, therefore, Defendants still violated §2923.5 by not initiating contact at least 30 day prior to recording the NOD.

(Declaration of Antonio cortes, "Robin Ellsworth's deposition" at page 47; lines 22-23.

17  
18  
19 7. Homeward attempted to contact  
20 Plaintiffs by telephone regarding their  
21 default.

**Disputed.** This assertion is not supported by any admissible evidence.

Defendants did not attempt to contact Plaintiffs by telephone, did not send Plaintiffs first-class letter, did not send Plaintiffs a certified letter or provide a means for them to contact Defendants' live representative. (Exhibits "A" and "B", Declarations of Samuel D. And Robin Ellsworth, ¶¶ 9-14. )

1		<b><u>Objection:</u></b> lacks foundation, hearsay and
2		vague. This UF is quoted from Cindi
3		Ellis's declaration, but that source
4		contains no information on how she
5		developed this conclusion.
6		
7	8. Homeward called Plaintiffs' home	<b><u>Disputed.</u></b> This assertion is not supported
8	telephone number on November 16, 2011	by any admissible evidence.
9	and left them a message to call back.	Defendants did not attempt to contact
10		Plaintiffs by telephone, did not send
11		Plaintiffs first-class letter, did not send
12		Plaintiffs a certified letter or provide a
13		means for them to contact Defendants'
14		live representative. (Exhibits "A" and
15		"B", Declarations of Samuel D. And
16		Robin Ellsworth, ¶¶ 9-14. )
17		<b><u>Objection:</u></b> lacks foundation, hearsay and
18		vague. This UF is quoted from Cindi
19		Ellis's declaration, but that source
20		contains no information on how she
21		developed this conclusion.
22		
23		
24	9. Homeward called Plaintiffs' business	<b><u>Disputed.</u></b> This assertion is not supported
25	number on November 21, 2011 and left a	by any admissible evidence.
26	message to call back.	Defendants did not attempt to contact
27		Plaintiffs by telephone, did not send
28		

1		Plaintiffs first-class letter, did not send
2		Plaintiffs a certified letter or provide a
3		means for them to contact Defendants'
4		live representative. (Exhibits "A" and
5		"B", Declarations of Samuel D. And
6		Robin Ellsworth, ¶¶ 9-14. )
7		<b><u>Objection:</u></b> lacks foundation, hearsay and
8		vague. This UF is quoted from Cindi
9		Ellis's declaration, but that source
10		contains no information on how she
11		developed this conclusion.
12		
13	10. Homeward called Plaintiffs' home	<b><u>Disputed.</u></b> This assertion is not supported
14	number on December 1, 13, 16, and 29,	by any admissible evidence.
15	2011 and left a message to call back.	Defendants did not attempt to contact
16		Plaintiffs by telephone, did not send
17		Plaintiffs first-class letter, did not send
18		Plaintiffs a certified letter or provide a
19		means for them to contact Defendants'
20		live representative. (Exhibits "A" and
21		"B", Declarations of Samuel D. And
22		Robin Ellsworth, ¶¶ 9-14. )
23		<b><u>Objection:</u></b> lacks foundation, hearsay and
24		vague. This UF is quoted from Cindi
25		Ellis's declaration, but that source
26		contains no information on how she
27		developed this conclusion.
28		

1 11. Homeward called Plaintiffs' business  
2 number on December 9, 23 and 29, 2011  
3 and left a message to call back.  
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**Disputed.** This assertion is not supported  
by any admissible evidence.

Defendants did not attempt to contact  
Plaintiffs by telephone, did not send  
Plaintiffs first-class letter, did not send  
Plaintiffs a certified letter or provide a  
means for them to contact Defendants'  
live representative. (Exhibits "A" and  
"B", Declarations of Samuel D. And  
Robin Ellsworth, ¶¶ 9-14. )

**Objection:** lacks foundation, hearsay and  
vague. This UF is quoted from Cindi  
Ellis's declaration, but that source  
contains no information on how she  
developed this conclusion.

17 12. Homeward called Plaintiffs' cell  
18 phone number on December 20, 2011  
19 and left a message to call back.  
20  
21  
22  
23  
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26  
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**Disputed.** This assertion is not supported  
by any admissible evidence.

Defendants did not attempt to contact  
Plaintiffs by telephone, did not send  
Plaintiffs first-class letter, did not send  
Plaintiffs a certified letter or provide a  
means for them to contact Defendants'  
live representative. (Exhibits "A" and  
"B", Declarations of Samuel D. And  
Robin Ellsworth, ¶¶ 9-14. )

**Objection:** lacks foundation, hearsay and

1		vague. This UF is quoted from Cindi
2		Ellis's declaration, but that source
3		contains no information on how she
4		developed this conclusion.
5		
6	13. Homeward called Plaintiffs' home	<b><u>Disputed.</u></b> This assertion is not supported
7	number on January 11, 17, 18, 19, 20,	by any admissible evidence.
8	and 25, 2012	Defendants did not attempt to contact
9		Plaintiffs by telephone, did not send
10		Plaintiffs first-class letter, did not send
11		Plaintiffs a certified letter or provide a
12		means for them to contact Defendants'
13		live representative. (Exhibits "A" and
14		"B", Declarations of Samuel D. And
15		Robin Ellsworth, ¶¶ 9-14. )
16		<b><u>Objection:</u></b> lacks foundation, hearsay and
17		vague. This UF is quoted from Cindi
18		Ellis's declaration, but that source
19		contains no information on how she
20		developed this conclusion.
21		
22	14. Homeward called Plaintiffs' business	<b><u>Disputed.</u></b> This assertion is not supported
23	number on January 11, 2012 and left a	by any admissible evidence.
24	message to call back.	Defendants did not attempt to contact
25		Plaintiffs by telephone, did not send
26		Plaintiffs first-class letter, did not send
27		Plaintiffs a certified letter or provide a
28		



1		means for them to contact Defendants’
2		live representative. (Exhibits “A” and
3		“B”, Declarations of Samuel D. And
4		Robin Ellsworth, ¶¶ 9-14. )
5		<b><u>Objection:</u></b> lacks foundation, hearsay and
6		vague. This UF is quoted from Cindi
7		Ellis’s declaration, but that source
8		contains no information on how she
9		developed this conclusion.
10		
11	15. Homeward sent Plaintiffs letters	<b><u>Disputed.</u></b> This assertion is not supported
12	regarding their Loan by first class mail in	by any admissible evidence.
13	November and December, 2010.	Defendants did not attempt to contact
14		Plaintiffs by telephone, did not send
15		Plaintiffs first-class letter, did not send
16		Plaintiffs a certified letter or provide a
17		means for them to contact Defendants’
18		live representative. (Exhibits “A” and
19		“B”, Declarations of Samuel D. And
20		Robin Ellsworth, ¶¶ 9-14. )
21		<b><u>Objection:</u></b> lacks foundation, hearsay and
22		vague. This UF is quoted from Cindi
23		Ellis’s declaration, but that source
24		contains no information on how she
25		developed this conclusion.
26		
27	16. Homeward sent Plaintiffs a letter by	<b><u>Disputed.</u></b> This assertion is not supported
28		

certified mail regarding their delinquency in January and February 2012.

by any admissible evidence.

Defendants did not attempt to contact Plaintiffs by telephone, did not send Plaintiffs first-class letter, did not send Plaintiffs a certified letter or provide a means for them to contact Defendants' live representative. (Exhibits "A" and "B", Declarations of Samuel D. And Robin Ellsworth, ¶¶ 9-14. )

**Objection:** lacks foundation, hearsay and vague. This UF is quoted from Cindi Ellis's declaration, but that source contains no information on how she developed this conclusion.

17. Homeward caused a Notice of Default to be recorded in April 2012.

**Undisputed.**

18. Since this litigation has been pending, Plaintiffs have submitted loan modification applications two separate times.

**Objection.** This material is privileged settlement communication. This fact is immaterial to determining whether Defendants complied with §2923.5 at least 30 days prior to recording the NOD on April 16, 2012.

19. Plaintiffs admit that they did not read their mail and they just left it in a pile,

**Disputed.** This assertion is not supported by any admissible evidence.

1 unopened.

2 Defendants did not attempt to contact  
3 Plaintiffs by telephone, did not send  
4 Plaintiffs first-class letter, did not send  
5 Plaintiffs a certified letter or provide a  
6 means for them to contact Defendants'  
7 live representative. (Exhibits "A" and  
8 "B", Declarations of Samuel D. And  
9 Robin Ellsworth, ¶¶ 9-14. )

10 20. *Intentionally left blank.*

11  
12 21. Homeward maintains a toll-free  
13 number for its borrowers to contact it  
14 during regular business hours.

15 **Disputed.** This assertion is not supported  
16 by any admissible evidence.  
17 Defendants did not attempt to contact  
18 Plaintiffs by telephone, did not send  
19 Plaintiffs first-class letter, did not send  
20 Plaintiffs a certified letter or provide a  
21 means for them to contact Defendants'  
22 live representative. (Exhibits "A" and  
23 "B", Declarations of Samuel D. And  
24 Robin Ellsworth, ¶¶ 9-14. )

25 22. Homeward also maintains a web site  
26 that includes information concerning  
27 foreclosure-avoidance options, a list of  
28 financial documents borrowers should  
collect to enable them to discuss

**Disputed.** This assertion is not supported  
by any admissible evidence.  
Defendants did not attempt to contact  
Plaintiffs by telephone, did not send  
Plaintiffs first-class letter, did not send

1 2 3 4 5 6	foreclosure-avoidance options with Homeward; Homeward's toll-free telephone number; HUD's toll-free telephone number to reach a HUD-certified counselling agency.	Plaintiffs a certified letter or provide a means for them to contact Defendants' live representative. (Exhibits "A" and "B", Declarations of Samuel D. And Robin Ellsworth, ¶¶ 9-14. )
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7 8 9 10	23. Plaintiffs served no discovery whatsoever in this Action.	<u><b>Undisputed</b></u> , but immaterial.
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11 12 13 14 15 16	24. Plaintiffs commenced their Action against Defendants by filing their Complaint in the Orange County Superior Court on August 2, 2012.	<u><b>Undisputed</b></u> , but immaterial.
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17 18 19 20 21 22	25. Defendants removed the case to the United States District Court for the Central District of California, Orange County Division on September 7, 2012.	<u><b>Undisputed</b></u> , but immaterial.
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23 24 25 26 27 28	26. Defendants filed their Answer to Plaintiffs Complaint on September 14, 2011.	<u><b>Undisputed</b></u> , but immaterial.
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27. Plaintiff Samuel Ellsworth is a Senior Vice President of New American Funding, based out of Tustin, California.

Undisputed, but immaterial.

28. Plaintiff estimates his current gross monthly income at “upwards of 60 maybe \$70,000 a month.”

Undisputed, but immaterial.

## 2. ADDITIONAL FACTS

ADDITIONAL FACTS	EVIDENCE
1. On April 16, 2012, Defendants recorded a Notice of Default against the Subject Property.	1. Plaintiffs’ Exhibit “1”, Declaration Of Samuel and Robin Ellsworth; ¶7.
2. American Home Mortgage Servicing (“AHMSI”), Inc. Did not send Plaintiffs a first-class letter that included the toll-free telephone number made available by HUD to find a HUD-certified housing counseling agency.	2. Plaintiffs’ Exhibit “1”, Declaration Of Samuel and Robin Ellsworth; ¶11.
3. AHMSI did not attempt to contact	3. Plaintiffs’ Exhibit “1”, Declaration

1 2 3 4	Plaintiffs by telephone at least three times at different hours and on different days.	Of Samuel and Robin Ellsworth; ¶12.
5 6 7	4. AHMSI did not send Plaintiffs a certified letter with return receipt requested.	4. Plaintiffs' Exhibit "1", Declaration Of Samuel and Robin Ellsworth; ¶13.
8 9 10 11 12 13	5. AHMSI did not provide Plaintiffs with a means of contacting it in a timely manner, which included a toll-free telephone number that provided access to a live representative during business hours.	5. Plaintiffs' Exhibit "1", Declaration Of Samuel and Robin Ellsworth; ¶15.

14  
15  
16  
17 Dated: May 13, 2013

18  
19 LAW OFFICES OF JOSEPH R. MANNING,  
20 JR., APC

21  
22 By /s/Joseph R. Manning, Jr.  
23 Joseph R. Manning, Jr.  
24 Attorneys for Plaintiffs  
25  
26  
27  
28

**CERTIFICATE OF SERVICE**

I, the undersigned, declare that I am over the age of 18 and am not a party to this action. I am employed in the City of Pasadena, California; my business address is 4667 MacArthur Blvd., Suite 150, Newport Beach, California 92660

On the date below, I served a copy of the following document(s):

**PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT, OPPOSITION TO DEFENDANTS' REQUEST FOR JUDICIAL NOTICE, PLAINTIFFS' OBJECTIONS TO THE DECLARATIONS OF CINDI ELLIS AND ANTONIO CORTES, AND PLAINTIFFS' STATEMENT OF GENUINE ISSUES OF MATERIAL FACTS** on all interested parties in said case addressed as follows:

**Served Electronically via Court's CM/ECF System:**

*Attorneys for Defendant*

Antonio L. Cortes

SMITH DOLLAR PC

404 Mendocino Avenue, Second Floor

Santa Rosa, CA 95401

ACORTES@SMITHDOLLAR.COM

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. I declare that I am employed in the office of a member of the Bar of this Court at whose direction the service was made.

This declaration is executed in Newport Beach, California, on **May 13, 2013**.



Tina Mehrazar